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No. 83-658

In the Supreme Court of the United States

OCTOBER TERM, 1983

GARY HALBERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in allowing the government to rebut expert testimony on the issue of petitioner's mental state at the time of the offense.

2. Whether the district court erred in admitting evidence of petitioner's activities during the period he claimed to be incompetent.

3. Whether there was juror misconduct requiring an evidentiary hearing.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 712 F.2d 388.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1983. A petition for rehearing was denied on August 23, 1983. The petition for a writ of certiorari was filed on October 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on 16 counts of mail fraud,

in violation of 18 U.S.C. 1341 (Pet. App. A1).[1] Petitioner was sentenced to concurrent 18-month terms of imprisonment on each count (Pet. 4). The court of appeals affirmed (Pet. App. A1-A5).

1. The evidence at trial showed that petitioner, with the assistance of co-defendants Lawrence Bucklan and George Culbertson,[2] initiated three mail order promotions in 1976 to profit from the Nation's bicentennial anniversary (2 Tr. 220-226; 3 Tr. 347-350, 373-374). Solicitations for the sale of high quality commemorative books and a collector's plate were mailed to thousands of people across the country (2 Tr. 223-225; 3 Tr. 351, 374). Petitioner and his co-defendants used false and fictitious names to deceive the public into believing that the bicentennial books and plate were offered for sale by bona fide historical societies and a collector's guild (3 Tr. 360, 373). In reality, the scheme was operated out of a single "boiler room" (3 Tr. 373-374).

The elaborately described commemorative items solicited in the mailings did not in fact exist (2 Tr. 239; 3 Tr. 363, 374). Petitioner and his cohorts obtained approximately $200,000 from people who responded to their mail solicitations (2 Tr. 237; 3 Tr. 363, 374). This money was used by petitioner and his co-defendants for other mailings and personal expenses (2 Tr. 239; 3 Tr. 365-366).

When non-delivery complaints were received, lulling letters containing various false statements were sent at petitioner's direction and approval to explain the

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[1] Petitioner was indicted on 21 counts, but 5 counts were dismissed at the close of his first trial (Pet. 4).

[2] Co-defendants Bucklan and Culbertson pleaded guilty prior to petitioner's trial (2 Tr. 249; 3 Tr. 387).

reasons for the "delay in shipment" (2 Tr. 242-243; 3 Tr. 367). Petitioner instructed Bucklan and Culbertson to conceal his role in the ventures if interviewed by postal authorities (2 Tr. 245; 3 Tr. 383, 386). When first interviewed by postal inspectors, petitioner himself denied that he had any connection with the bicentennial promotions (3 Tr. 409).

2. Prior to trial, petitioner gave notice of his intention to rely on a defense of diminished capacity. The evening before trial, petitioner was examined by forensic psychiatrist Dr. David M. Trockman (4 Tr. 625; 5 Tr. 738). At trial, Trockman testified that petitioner was so mentally deranged during the period covered by the mail fraud charges that he lacked the specific intent to defraud (4 Tr. 609). In Trockman's opinion, petitioner had been brainwashed by a therapy group he had joined and that even if petitioner had intended to defraud others, it really would not have been he doing it (4 Tr. 613, 644). In forming that opinion, Dr. Trockman relied extensively on statements petitioner made during his examination (4 Tr. 611, 623-624, 628). Dr. Trockman then proceeded to relate some of petitioner's statements (4 Tr. 618-639).

Petitioner thereafter testified on his own behalf, saying that the failure of the bicentennial promotions was due to his co-defendants' ineptitude and his own bad decisions (5 Tr. 711-719). Petitioner admitted on cross-examination that, during the period of his therapy, he had written stamp collecting and silver commodities books (5 Tr. 747-752). He claimed, however, that during this same period of time his mail order stamp promotion (G.C.H. and Co.) was successfully managed by George and Charlotte Jenney, who did the banking, filled the orders, and made any

refunds (5 Tr. 709-711). Petitioner denied any knowledge that G.C.H. and Co. had also failed to make promised refunds (5 Tr. 752).

In rebuttal, the government presented Dr. Saul Faerstein, a forensic psychiatrist, who had examined petitioner a week before trial (5 Tr. 822). Dr. Faerstein testified that, in his opinion, petitioner had the capacity during the period covered by the indictment to defraud the persons named as victims in that document (5 Tr. 823). He found no evidence that petitioner was "brainwashed" during the relevant period (5 Tr. 825), and he declined to express an opinion whether or not petitioner actually exercised an intent to defraud because that issue was "clearly in the domain of the jury" (5 Tr. 829).

The government also presented the testimony of Kay Petitte, who was petitioner's secretary during the time he claimed to be incompetent, to rebut petitioner's assertion that he was not actively in charge of the successful stamp book promotion (5 Tr. 812). Petitte testified that she regularly received orders from petitioner and that it was petitioner who had directed her not to fulfill refund obligations (5 Tr. 812-815).

ARGUMENT

1. Petitioner contends (Pet. 6-13) that the district court erred in allowing into evidence the testimony of the government's psychiatrist concerning statements made by petitioner during a court-ordered psychiatric examination. Specifically, petitioner argues that such testimony violated Fed. R. Crim. P. 12.2(c), his Fifth Amendment right against self-incrimination, this Court's holding in *Estelle* v. *Smith*, 451 U.S. 454 (1981), and the holdings of other lower federal courts. Petitioner's arguments are meritless.

Rule 12.2(b) requires a defendant to give notice prior to trial of his intention to rely on a defense of mental disease or defect inconsistent with an essential element required for the offense charged. Rule 12.2(c) gives the trial court authority, upon motion of the government, to order the defendant to submit to an examination by a psychiatrist designated by the court. At the time of petitioner's trial, Rule 12.2(c) also provided that "[n]o statement made by the accused in the course of any examination provided for by this rule, * * * shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding." [3]

Petitioner filed notice prior to trial of his intention to rely on the defense of diminished capacity (Pet. 6) and submitted to a court-ordered examination (Pet. 7). The psychiatrist testified at trial without objection. The testimony contested by petitioner, therefore, constitutes grounds for reversal only if its admission into evidence was plain error. Fed. R. Crim. P. 52(b).[4]

Petitioner does not dispute the fact that, had he chosen to rely on the defense of insanity, his statements to the psychiatrist would have been admissible

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[3] Rule 12.2(c) has since been amended to remove any possible doubt that petitioner's statements to the government psychiatrist were properly admitted into evidence. The new rule deletes the problem phrase "on the issue of guilt" and specifically provides that evidence developed during a court-ordered examination may be used "on an issue respecting mental condition on which the defendant has introduced testimony." House Comm. on the Judiciary, 98th Cong., 1st Sess., *Rules of Criminal Procedure for the United States District Courts* 15 (Comm. Print 1983).

[4] See *United States* v. *Dysart*, 705 F.2d 1247, 1253-1254 (10th Cir. 1983); *United States* v. *Bondurant*, 689 F.2d 1246, 1249 (5th Cir. 1982).

(Pet. App. A3).[5] Petitioner argues, however, that because he chose to rely on the defense that he suffered from a mental condition vitiating the mental element of the crime charged (under Rule 12.2(b)) instead of a defense of insanity (under Rule 12.2 (a)), his statements to the psychiatrist bear directly on the issue of guilt and are thus inadmissible under Rule 12.2(c).

As the court of appeals found (Pet. App. A3), however, petitioner's argument elevates form over substance. "[T]here is no indication that the language in Rule 12.2[(c)] regarding statements 'on the issue of guilt' was designed to cover statements relating to defendant's mental capacity. Issues relating to defendant's mental capacity necessarily overlap with 'the issue of guilt.' Because Congress intended to permit the admission of statements related to insanity, there is little doubt that it also intended to admit statements related to mental capacity in general" (Pet. App. A3).[6]

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[5] See H.R. Conf. Rep. 94-414, 94th Cong., 1st Sess. 10 (1975):

> [Rule 12.2] does not preclude use of statements made by a defendant during a court-ordered psychiatric examination. The statements may be relevant to the issue of defendant's sanity and admissible on that issue.

[6] The correctness of the court's reasoning is borne out by the recent amendments to Rule 12.2(c). The amendment to the rule specifically provides that statements made by a defendant in a court-ordered examination shall be admitted into evidence on the issue of his mental condition once he has introduced evidence on the subject. The Advisory Committee's Note makes clear that the change in wording did not change the law under Rule 12.2(c). H.R. Doc. 98-55, 98th Cong., 1st Sess. 55 (1983). Rather, the changes were made to reflect more accurately the Fifth Amendment considerations at play

The sole purpose of an examination under Rule 12.2(c) is to provide the government with evidence regarding a defendant's mental capacity. *United States* v. *Madrid*, 673 F.2d 1114, 1120-1121 (10th Cir. 1982), cert. denied, No. 81-6726 (Oct. 4, 1982); *United States* v. *Leonard*, 609 F.2d 1163, 1165-1166 (5th Cir. 1980); *United States* v. *Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981), aff'd on other grounds, 672 F.2d 115 (1982). Therefore, when a defendant raises an issue regarding his mental capacity, and especially when he relies on his own psychiatrist witness, he should not be allowed to muzzle the government's psychiatrist at his option (Pet. App. A3). *United States* v. *Julian*, 469 F.2d 371, 376 (10th Cir. 1972). This logic applies equally when the issue raised by the defendant is "diminished capacity" rather than "insanity" (see Pet. App. A3).[7]

Petitioner argues that this Court's ruling in *Estelle* v. *Smith*, *supra*, precludes the use of his statements to the government's psychiatrist. In *Estelle*, this Court held that a "criminal defendant, *who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence*, may not be compelled to respond to a psychiatrist if his statements can be used against

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in this context as well as this Court's recent decision in *Estelle* v. *Smith*, *supra*. The Committee Note specifically points out that a court-ordered sanity or other mental examination may be the only means available to the state to controvert proof on an issue the defendant has interjected into the case. H.R. Doc. 98-55, *supra*, at 55. See *Estelle*, 451 U.S. at 465.

[7] Cf. *United States* v. *Cohen*, 530 F.2d 43, 48 (5th Cir. 1976) ("[t]o hold that compelled psychiatric examinations are forbidden because sanity is an element of the offense and that the privilege against self-incrimination prohibits compulsory elicitation of statements going to an element of the offense would be confining ourselves within an analytical prison").

him at a capital sentencing proceeding." 451 U.S. at 468 (emphasis added). The Court therefore foreclosed the use of information learned during a competency examination—an examination neither sought by nor even known to defense counsel—at the penalty phase of a bifurcated proceeding. At the same time, however, the Court was careful to emphasize that "a different situation arises where a defendant intends to introduce psychiatric evidence." 451 U.S. at 472.

Since petitioner put his mental competency at issue when he raised the diminished capacity defense and introduced psychiatric testimony on that defense, the situation here is one of the "different situations" contemplated by this Court in *Estelle*. "In such circumstances examination by a psychiatrist may be ordered and he may testify against the defendant concerning the competency issue without violation of the Fifth Amendment privilege." *United States* v. *Madrid*, 673 F.2d at 1121; accord, *Vardas* v. *Estelle*, 715 F.2d 206, 209 (5th Cir. 1983); *United States* v. *Reifsteck*, 535 F.2d 1030, 1033-1034 (8th Cir. 1976); *Karstetter* v. *Cardwell*, 526 F.2d 1144, 1145 (9th Cir. 1975); *United States* v. *Greene*, 497 F.2d 1068, 1081 (7th Cir. 1974), cert. denied, 420 U.S. 909 (1975); *United States* v. *Bohle*, 445 F.2d 54, 66-67 (7th Cir. 1971); *United States* v. *Weiser*, 428 F.2d 932, 936 (2d Cir. 1969), cert. denied, 402 U.S. 949 (1971); *United States* v. *Albright*, 388 F.2d 719, 724-725 (4th Cir. 1968).

Here, no statement concerning the offense itself was offered into evidence by the government through the psychiatrist. Nor did the psychiatrist testify that petitioner actually had an intent to defraud at the time of the offense. That question was left for the jury's determination. Moreover, it was entirely proper

for the psychiatrist to state the basis upon which he had formed his opinion, even if that basis included statements made by petitioner. See *Hollis* v. *Smith*, 571 F.2d 685, 690 (2d Cir. 1978) (the self-incrimination privilege protects only against the compulsion of incriminating testimonial declarations; responses to a psychiatrist, presenting no threat of disclosure of prosecutable crimes, do not rise to the level of "compelled testimonial self-incrimination"). See also *Ronson* v. *Commissioner of Correction*, 551 F. Supp. 450, 457 (S.D.N.Y. 1982).

Contrary to petitioner's contention (Pet. 11-12), the ruling of the court below is not in conflict with its own decisions or those of other federal courts. The cases relied on by petitioner have either been mischaracterized by him [8] or deal with 18 U.S.C. 4244, not Rule 12.2.[9] Unlike an examination under

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[8] Petitioner cites *United States* v. *Leonard*, 609 F.2d 1163 (5th Cir. 1980), as a case at odds with the decision below. Petitioner fails to point out that the defendant in *Leonard*, subsequent to the psychiatrist's examination but before trial, stipulated to his mental competency at the time of the alleged offenses and waived the issue. At trial, the government cross-examined Leonard as to the statements made by him to the psychiatrist. The court found that the use of such statements on issues other than sanity was impermissible under Rule 12.2(c). The court did not rule, however, that such statements would not have been admissible on the issue of sanity.

[9] There is some confusion as to whether a psychiatrist who has conducted a court-ordered examination pursuant to 18 U.S.C. 4244 on a defendant's competency to stand trial may also testify at trial regarding the defendant's mental state at the time of the charged offense. Cases allowing such dual purpose examinations include *United States* v. *Whitlock*, 663 F.2d 1094, 1107 (D.C. Cir. 1980); *United States* v. *Cohen*, 530 F.2d 43, 47-48 (5th Cir. 1976); *United States* v. *Albright*, 388 F.2d 719, 724-725 (4th Cir. 1968). But see *United States*

Section 4244, which is designed to determine competency at the time of trial, the very purpose of a court-ordered examination under Rule 12.2(c) is to secure testimony on the issue of mental condition at the time of the alleged offense. *United States* v. *Leonard*, 609 F.2d at 1166.

2. Petitioner's next contention (Pet. 18-20) is that the district court erred in allowing into evidence testimony concerning business promotions managed by petitioner during the time he was allegedly incompetent. Specifically, petitioner complains that the rebuttal testimony of his former secretary, Kay Petitte, was offered to impeach his credibility on an extrinsic matter and thereby violated Fed. R. Evid. 608(b). However, as the court of appeals found (Pet. App. A5), Petitte's testimony was not offered solely to impeach petitioner's credibility but also was highly relevant concerning petitioner's defense of diminished capacity. Further review of this essentially fact-bound claim is unwarranted.

On direct examination, petitioner testified about his "other" promotions.[10] He had stated that G.C.H. and Co. was run by George and Charlotte Jenney and that they had been in charge of banking, filling or-

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v. *Alvarez*, 519 F.2d 1036, 1042 (3d Cir. 1975); *United States* v. *Malcolm*, 475 F.2d 420, 427 (9th Cir. 1973). We note that the *Malcolm* court seemed to base its decision on the fact that defendant had not placed his sanity in issue at the time of the examination. 475 F.2d at 425.

[10] Having opened up the subject of his involvement in the G.C.H. promotion during his own direct examination and having denied knowledge of refund problems on cross-examination, petitioner cannot now complain that testimony reflecting upon his truthfulness was admitted. See *United States* v. *Wright*, 542 F.2d 975, 980 (7th Cir. 1976).

ders, and making refunds. In rebuttal, Petitte testified that petitioner had given her directions in regard to the operations of G.C.H. and Co. and that he had specifically told her he was low on funds and could not authorize further refunds. This testimony was relevant and necessary to rebut petitioner's claim that he was not capable of making business decisions at the time of the charged offenses. As the district court noted before Petitte testified (5 Tr. 810-811), "almost anything she says in regard to his position of not giving refunds would be relevant as to the intent and state of mind he was acting with during concurrent promotions." That ruling certainly was correct.[11]

3. Petitioner finally contends (Pet. 13-18) that he was denied a fair trial because the jury had access to a newspaper article about the auction of a Santa Monica beach house he had rented four years earlier. The court of appeals, after an independent review of the alleged juror misconduct, agreed with the district court that there was no possibility that the extrinsic material could have affected the verdict (Pet. App. A1-A2). There is no reason to review further this fact-based decision by both courts below.

Immediately following trial, petitioner's counsel confronted several jurors and asked why petitioner had been convicted (7 Tr. 982). One juror purportedly responded that petitioner's beach house "didn't

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[11] See Fed. R. of Evid. 404(b). See also *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967) (listing proof of intent as one permissible use of prior crimes evidence); *United States* v. *Weidman*, 572 F.2d 1199, 1202 (7th Cir. 1978) (mail fraud requires proof of intent and similar uncharged acts are admissible when accused has denied having the intent to commit the acts charged).

help him any" (Pet. App. G1). Another juror removed from her purse a newspaper article containing a photograph of petitioner's former house with a description of its history. The article did not refer to petitioner in any manner.

During trial, co-defendants Bucklan and Culbertson had testified that the $1,800 monthly rent on the house had been paid from proceeds of the bicentennial promotions (2 Tr. 240; 3 Tr. 366). There was no objection to the receipt into evidence of an enlarged photograph of the beach house or the $1,800 rent checks (2 Tr. 240; 3 Tr. 309-312, 377).

The court of appeals found that the juror misconduct allegations did not require reversal because at the trial "the jurors heard considerable evidence about the beach house and [petitioner's] life style" (Pet. App. A2). The newspaper articles did not include evidence that was inadmissible or that was not already properly available to the jury. See *United States* v. *Jones*, 542 F.2d 186, 196 (4th Cir.), cert. denied, 426 U.S. 922 (1976). Nor did the district court abuse its discretion in not holding an evidentiary hearing. See *United States* v. *Hendrix*, 549 F.2d 1225, 1229 (9th Cir.), cert. denied, 434 U.S. 818 (1977) (trial court had discretion to determine whether to hold evidentiary hearing). A hearing was not necessary in this situation, where the full nature of the extraneous material was known and its lack of prejudicial effect was clear. *United States* v. *Hood*, 593 F.2d 293 (8th Cir. 1979); *United States* v. *Hendrix*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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